SUPREME COURT OF THE UNITED STATES.

No. 289.

ADAM VAN ALLEN, IN BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS IN THE FIRST NATIONAL BANK OF ALBANY, PLAINTIFF IN ERROR,

vs.

MICHAEL A. NOLAN, THOMAS DOLAN, AND JOHN SMITH, AS THE BOARD OF ASSESSORS OF THE CITY OF ALBANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in an action which is in the said court of appeals of the State of New York, before you, between Adam Van Allen, in behalf of himself and all other stockholders in the First National Bank of Albany, and Michael A. Nolan, Thomas Dolan and John Smith, as the board of assessors of the city of Albany, a manifest error hath happened, to the great damage of the said Adam Van Allen, in behalf of himself and all other stockholders in the First National Bank of Albany, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

2 you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[SEAL.] AUGUSTUS A. BOYER, *Clerk.*

JOHN H. REYNOLDS,
Attorney for Pl'ff in Error, Albany, N. Y.

4 The answer of the judges of the court of appeals of the State of New York in the within writ named, doth certify, under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in anywise concerning the same, as appears in a certain schedule to this writ annexed, as within it is commanded.

By the court.

[SEAL.] COR'S TEN BROECK, *Dep. Clerk.*

5 In the court of appeals of the State of New York.

ADAM VAN ALLEN, in behalf of himself and all other stockholders in the First National Bank of Albany,
agst.
MICHAEL A. NOLAN, THOMAS DOLAN AND John Smith, as the Board of Assessors of the City of Albany.

Take notice that the above-named defendants appeal from the judg-

ment entered in the above action in the Albany county clerk's office, September 22d, 1865, on the decision of the general term of the supreme court of the third judicial district, against said defendants, in favor of plaintiff, to the court of appeals of the State of New York.

Yours, &c.,

S. F. HIGGINS,
Attorney for Appellant.

To TREMAIN & PECKHAM, Esqs.,
Attorneys for Respondents, &c.
G. K. WINNE, *Clerk of Albany County.*

6 *Case agreed upon.*

Supreme court, Albany county.

ADAM VAN ALLEN, in behalf of himself and all other stockholders in the First National Bank of Albany,
agst.
MICHAEL A. NOLAN, THOMAS DOLAN AND John Smith, as the Board of Assessors of the City of Albany.

The above plaintiff and the above defendants having a controversy depending upon certain facts uncontradicted, do, in pursuance of the three hundred and seventy-second section of the Code of Procedure, hereby agree upon the facts upon which such controversy arose, and hereby agree to submit the same to the general term of the supreme court. The following are the facts submitted and agreed upon, viz:

The First National Bank of Albany is a corporation, located and doing business in the fifth ward of the city of Albany, and has been so located for more than a year last past. The said bank was authorized to commence a banking business by the Comptroller of the Currency of the United States, under date of Washington, February 19, 1864, and commenced business under such authority on the 22d day of February, 1864, and such authority was given, and the said bank was organized as such bank, under and by virtue of the act of Congress of the United States approved February 25, 1863, entitled, "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and the bank has in all things complied with its provisions. The plaintiff, Adam Van Allen, is a stockholder in said bank, and has been for a year past. The defendants are the assessors of the city of Albany, and, as such, constitute the board of assessors of said city. The capital stock of the said bank is three hundred thousand dollars. At the time of making the assessment hereinafter mentioned, and now, the said bank was and is the owner of the stocks and

7 bonds of the United States to the amount of four hundred and twenty-five thousand dollars—one hundred and fifty-one thousand dollars in six per cent. bonds issued under the authority of "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the Uni-

ted States," approved February 25, 1862; one hundred and forty-nine thousand dollars in five per cent. bonds, issued under authority of an act approved March 3, 1864, and entitled "An act supplementary to an act entitled 'An act to provide ways and means for the support of the Government,'" approved March 3, 1864; and one hundred and twenty-five thousand dollars in the so-called $7\frac{3}{10}$ treasury notes issued under the authority of "An act to provide ways and means for the support of the government," approved March 3, 1865. The whole of the capital stock of the said bank is, and was at the time of the assessment hereinafter mentioned, invested in the stocks above set forth, and in the treasury notes above described. The above defendants, acting as the board of assessors of the city of Albany, between the third Tuesday of April and the first day of September, 1865, assessed the above plaintiff, Adam Van Allen, in the fifth ward of said city of Albany, for fifty shares of the capital stock of the First National Bank of Albany, which amount he then held and owned, and they also assessed each of the stockholders in said bank, and assessed them in said fifth ward of said city, and placed the names of the plaintiff and of all of said stockholders upon the assessment roll of said fifth ward of said city, and assessed each of them for the amount of the capital stock owned by each in said bank, and the amount of said assessment in each case was at the par value of the stock, viz: one hundred dollars per share—thus making an assessment of five thousand dollars against the plaintiff upon his fifty shares, and the total assessment amounting to three hundred thousand dollars.

With the exception of Delevan Peck's thirty shares, all of the stockholders in said bank now reside, and did when the aforesaid
8 assessment was made reside, out of the fifth ward of the city of Albany. The assessment roll of said fifth ward is now in the hands and subject to the control of the above defendants.

Therefore, upon the above facts, the following questions arise, which are hereby submitted to this court:

First. Have the above defendants, as such board of assessors, the legal power or right to assess the plaintiff or any of the stockholders in said bank for the amount held by them of the capital stock of the said the First National Bank of Albany, or for any portion thereof? and if for any, what portion?

Second. Have they the power to assess any of the stockholders of the said bank in the fifth ward who do not reside therein?

If the court should be of the opinion that such defendants have no right or legal power to place the said names of the stockholders of the said bank upon the assessment roll and assess them for the amount of the capital stock of the said bank held by them, then the judgment of the court is to be that the names of the plaintiff, and of all the other stockholders in the said bank, which have been placed upon the assessment roll of the fifth ward for the amount of the capital stock of the said bank owned by them, shall be taken off the same by the defendants, and that a perpetual injunction issue against the defendants, restraining them from placing upon the assessment roll of

ment entered in the above action in the Albany county clerk's office, September 22d, 1865, on the decision of the general term of the supreme court of the third judicial district, against said defendants, in favor of plaintiff, to the court of appeals of the State of New York.

Yours, &c.,

S. F. HIGGINS,
Attorney for Appellant.

To TREMAIN & PECKHAM, Esqs.,
Attorneys for Respondents, &c.
G. K. WINNE, *Clerk of Albany County.*

6 *Case agreed upon.*

Supreme court, Albany county.

ADAM VAN ALLEN, in behalf of himself and all other stockholders in the First National Bank of Albany,
agst.
MICHAEL A. NOLAN, THOMAS DOLAN AND John Smith, as the Board of Assessors of the City of Albany.

The above plaintiff and the above defendants having a controversy depending upon certain facts uncontradicted, do, in pursuance of the three hundred and seventy-second section of the Code of Procedure, hereby agree upon the facts upon which such controversy arose, and hereby agree to submit the same to the general term of the supreme court. The following are the facts submitted and agreed upon, viz:

The First National Bank of Albany is a corporation, located and doing business in the fifth ward of the city of Albany, and has been so located for more than a year last past. The said bank was authorized to commence a banking business by the Comptroller of the Currency of the United States, under date of Washington, February 19, 1864, and commenced business under such authority on the 22d day of February, 1864, and such authority was given, and the said bank was organized as such bank, under and by virtue of the act of Congress of the United States approved February 25, 1863, entitled, "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and the bank has in all things complied with its provisions. The plaintiff, Adam Van Allen, is a stockholder in said bank, and has been for a year past. The defendants are the assessors of the city of Albany, and, as such, constitute the board of assessors of said city. The capital stock of the said bank is three hundred thousand dollars. At the time of making the assessment hereinafter mentioned,

7 and now, the said bank was and is the owner of the stocks and bonds of the United States to the amount of four hundred and twenty-five thousand dollars—one hundred and fifty-one thousand dollars in six per cent. bonds issued under the authority of "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the Uni-

ted States," approved February 25, 1862; one hundred and forty-nine thousand dollars in five per cent. bonds, issued under authority of an act approved March 3, 1864, and entitled "An act supplementary to an act entitled 'An act to provide ways and means for the support of the Government,'" approved March 3, 1864; and one hundred and twenty-five thousand dollars in the so-called $7\frac{3}{10}$ treasury notes issued under the authority of "An act to provide ways and means for the support of the government," approved March 3, 1865. The whole of the capital stock of the said bank is, and was at the time of the assessment hereinafter mentioned, invested in the stocks above set forth, and in the treasury notes above described. The above defendants, acting as the board of assessors of the city of Albany, between the third Tuesday of April and the first day of September, 1865, assessed the above plaintiff, Adam Van Allen, in the fifth ward of said city of Albany, for fifty shares of the capital stock of the First National Bank of Albany, which amount he then held and owned, and they also assessed each of the stockholders in said bank, and assessed them in said fifth ward of said city, and placed the names of the plaintiff and of all of said stockholders upon the assessment roll of said fifth ward of said city, and assessed each of them for the amount of the capital stock owned by each in said bank, and the amount of said assessment in each case was at the par value of the stock, viz: one hundred dollars per share—thus making an assessment of five thousand dollars against the plaintiff upon his fifty shares, and the total assessment amounting to three hundred thousand dollars.

With the exception of Delevan Peck's thirty shares, all of the stockholders in said bank now reside, and did when the aforesaid
8 assessment was made reside, out of the fifth ward of the city of Albany. The assessment roll of said fifth ward is now in the hands and subject to the control of the above defendants.

Therefore, upon the above facts, the following questions arise, which are hereby submitted to this court:

First. Have the above defendants, as such board of assessors, the legal power or right to assess the plaintiff or any of the stockholders in said bank for the amount held by them of the capital stock of the said the First National Bank of Albany, or for any portion thereof? and if for any, what portion?

Second. Have they the power to assess any of the stockholders of the said bank in the fifth ward who do not reside therein?

If the court should be of the opinion that such defendants have no right or legal power to place the said names of the stockholders of the said bank upon the assessment roll and assess them for the amount of the capital stock of the said bank held by them, then the judgment of the court is to be that the names of the plaintiff, and of all the other stockholders in the said bank, which have been placed upon the assessment roll of the fifth ward for the amount of the capital stock of the said bank owned by them, shall be taken off the same by the defendants, and that a perpetual injunction issue against the defendants, restraining them from placing upon the assessment roll of

the fifth ward in said city the names of the plaintiff, or of any of the stockholders in said bank, for the amount of the capital stock of the said bank owned by them.

If the court should be of the opinion that the plaintiff and the said owners of the capital stock of the said bank are liable to taxation for the amount of the capital stock held and owned by them, or for any portion thereof, then the judgment of the court is to be that the names of the plaintiff, and of the other owners of said stock, be kept upon said assessment roll, and that they are liable to taxation,
9 and that the defendants proceed with their duty in regard to the plaintiff and the other owners in the same manner as upon ordinary cases.

The amount of surplus of said bank is $100,400—about that sum.

(Signed) A. VAN ALLEN.
M. A. NOLAN.
THOMAS DOLAN.
JOHN SMITH.

6 CITY AND COUNTY OF ALBANY, *ss:*

Adam Van Allen, being duly sworn, says that he is plaintiff in above-submitted case; that the facts as above set forth are true and are agreed upon between the parties to this action; that the controversy is real, and the proceeding in good faith, to determine the rights of the parties.

A. VAN ALLEN.

Sworn before me September 20, 1865.
W. S. KELLY, *Com. of Deeds.*

CITY AND COUNTY OF ALBANY, *ss:*

Michael A. Nolan, Thomas Dolan, and John Smith, being each duly and severally sworn, do say, and each for himself says, that he is one of the defendants in the foregoing action, and that the foregoing facts have been agreed upon as constituting the facts in this case; that the controversy is real, and the proceeding in good faith, to determine the rights of the parties.

M. A. NOLAN,
THOMAS DOLAN,
JOHN SMITH.

Sworn before me Sept. 19, 1865.
J. HOWARD KING, *Com. of deeds.*

10 At a general term of the supreme court of the State o New York, held at the capitol in the city of Albany, on the 21st day of September, 1865.

Present: Hon. Henry Hogeboom, Hon. Theodore Miller, Hon. Charles R. Ingalls, justices.

ADAM VAN ALLEN, in behalf of himself and all other stockholders in the First National Bank of Albany,
agst.
MICHAEL A. NOLAN, THOMAS DOLAN and JOHN Smith, as the Board of Assessors of the City of Albany.

This cause coming on to be heard before this court, upon a case agreed upon between the above parties, under the provisions of section three hundred and seventy-two of the code, and after hearing the same argued by Mr. L. Tremain in favor of the plaintiff, and A. J. Parker, esq., in favor of defendants, and due deliberation being had thereon, it is ordered that the assessment made by the above defendants, as assessors, upon the plaintiff, and upon all the other stockholders in the First National Bank of Albany, for the amount of the shares of the capital stock of said bank held by them, is void.

It is further ordered, that the names of the plaintiff, and of all the other stockholders in the said bank, which have been placed upon the assessment roll of the fifth ward of the city of Albany for the amount of the capital stock of the said bank owned by them, shall (upon the service of a copy of the judgment to be entered in this action on the defendants) be taken off of said assessment roll before the same shall be delivered by said defendants to the supervisor of the fifth ward, or to any other supervisor, and before the same
11 shall pass out of their hands or control. It is further ordered, that a perpetual injunction issue out of this court against the defendants herein, forever restraining them from placing upon the assessment roll of the fifth or any other ward of the city of Albany, the names of the plaintiff, or of any of the stockholders in said First National Bank of Albany, for the amount of the shares of the capital stock of the said bank owned by them. It is further ordered, that judgment in pursuance of the provisions of this order be entered up and docketed against the defendants.

(Copy) G. K. WINNE, *Clerk.*

SIR: Take notice of an order this day entered with the clerk of Albany county, of which the foregoing is a copy.

Yours, &c.,

TREMAIN & PECKHAM, *Plaintiffs' Attorneys.*

To S. F. HIGGINS, Esq., *Defendants' Attorney.*

Judgment, Sept. 22, 1865.

Supreme court, Albany county.

ADAM VAN ALLEN, in behalf of himself and all the other stockholders of the First National Bank of Albany,
agst.
MICHAEL A. NOLAN, THOMAS DOLAN and John Smith as the Board of Assessors of the City of Albany.

Tremain & Peckham, plaintiffs' attorney.

This action having been argued before the general term of this

court, and said court having decided the same, and an order having been entered with the clerk of said court stating the terms and provisions of said decision, now, therefore, and in pursuance of said decision and order, and upon motion of Tremain & Peckham, attorneys for said plaintiffs, it is adjudged and decreed that the assessment made by the above defendants as the board of assessors of the
12 city of Albany against the above plaintiff and all other stockholders in the First National Bank of Albany, for the amount of the shares of the capital stock of the said bank held by them, is void.

It is further adjudged and decreed that the names of the plaintiff, and of all the other stockholders in said bank which have been placed upon the assessment roll of the fifth ward of the city of Albany for the amount of the capital stock of the said bank owned by them, shall (upon the service of a certified copy of this judgment on the defendants) be taken off of said assessment roll before the same shall be delivered by said defendants to the supervisors of the fifth ward, or to any other supervisors, and before the same shall pass out of their hands or control.

It is further adjudged and decreed that a perpetual injunction issue out of this court against the defendants herein, forever restraining them from placing upon the assessment roll of the fifth ward, or of any other ward of the city of Albany, the names of the plaintiff, or of any of the stockholders in said First National Bank of Albany, for the amount of the shares of the capital stock of the said bank owned by them.

G. K. WINNE, *Clerk.*

STATE OF NEW YORK, *City and County of Albany, Clerk's Office, ss:*

I, Giles K. Winne, clerk of said city and county, do hereby certify that I have compared the annexed copies of a notice of appeal and judgment roll with the originals on file in my office, and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of Albany, this 25th day of September, A. D. 1865.

[L. S.] G. K. WINNE, *Clerk.*

14 At a term of the court of appeals of the State of New York held for said State at the capitol, in the city of Albany, on the twelfth day of October, 1865.

Present: Hiram Denis, chief judge, presiding.

ADAM VAN ALLEN, in behalf of himself and all other stockholders in the First National Bank of Albany, respondent,

ag'st

MICHAEL A. NOLAN, THOMAS DOLAN and JOHN Smith, as the Board of Assessors of the City of Albany, appellants.

This cause having been brought on to argument on appeal by the defendants from a judgment of the supreme court of this State, ren-

dered in the second judicial district, after hearing Mr. Amasa J. Parker for the appellants, and Mr. Lyman Tremain for the respondents, and due deliberation having been thereupon had, it is ordered and adjudged, and this court does hereby order and adjudge, that the said judgment appealed from be, and the same is hereby reversed, with costs to be paid by the respondent, and judgment in this
15 action is hereby rendered in favor of the said defendants, with costs, and it is adjudged that the names of the plaintiffs, and of the other owners of stock referred to in the case submitted in the court below, be kept upon the assessment roll, and that they are liable to taxation, and that the defendants proceed with their duty in regard to the plaintiff and other owners in the same manner as in ordinary cases.

And it is hereby ordered and directed to be certified, that in this suit was drawn in question the validity of the statute of the State of New York entitled "An act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States," passed March 9th, 1865, on the ground that such statute was repugnant to the Constitution of the United States, and also on the ground that such statute was repugnant to the laws of the United States; and the decision of this court was in favor of the validity of such statute.

It is further certified as aforesaid, that in this suit was drawn in question the validity of an authority exercised under the Uni-
16 ted States, viz: an authority by national banks to exercise their corporate functions without having their stockholders subjected to taxation by State authority; and the decision was against the validity of such authority.

It is further certified as aforesaid, that in this suit was drawn in question the construction of art. one, sec. 8, sub-divisions 2 and 17, of the Constitution of the United States, and a claim to exemption from taxation under said section; and the decision was against the exemption claimed under said clause of the Constitution.

It is further certified, that in this suit was drawn in question the construction of the statute of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and a claim to a privilege or exemption from taxation under said statute; and the decision was against the privilege or exemption so claimed.

A copy. COR'S TEN BROECK, *Dep. Cl'k.*

17 UNITED STATES OF AMERICA, *ss:*

To Michael A. Nolan, Thomas Dolan, and John Smith, as the board of assessors of the city of Albany, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York,

wherein Adam Van Allen, in behalf of himself and all other stockholders in the First National Bank of Albany, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th day of October, in the year of our Lord 1865.

HIRAM DENIO,
Chief Judge of the Court of Appeals.

18 I hereby admit personal service of a copy of the within, Oct. 30, 1865.

S. F. HIGGINS, *Att'y for Def'ts.*

19 Supreme Court of the United States.—Of the December term, A. D. 1865.

ADAM VAN ALLEN, &c., plaintiff in error,
vs.
MICHAEL A. NOLAN AND OTHERS, as Board of Assessors of the City of Albany, def'ts in error. } In error.

Afterwards, to wit; on the first Monday of December, in this same term, before the justice of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Adam Van Allen, by John H. Reynolds, his attorney, and says that in the record and proceedings *and proceedings* aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error against the said defendants in error, and the said Adam Van Allen, plaintiff in error, prays that judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

JOHN H. REYNOLDS,
Attorney for Pl'ff in Error.

20 Supreme Court of the United States.

MICHAEL A. NOLAN AND OTHERS, as Board of Assessors of the City of Albany, def'ts in error,
ads.
ADAM VAN ALLEN, plaintiff in error. } In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and sixty-five, the said Michael A. Nolan and others, as board of assessors of the city of Albany, by Amasa J. Parker, their attorney,

freely comes here into court and says that there is no error, either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine, as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

AMASA J. PARKER,
Attorney for Def'ts in Error.

Filed November 6, 1865.

REC. 289—2

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Adam Van Allen *et al.*, Plaintiffs in Error,
vs.
William A. Nolan *et al.*, The Board of Assessors of the City of Albany.

POINTS FOR PLAINTIFFS IN ERROR.

The facts out of which this controversy springs, and the questions of law arising thereon, are fully and briefly stated in the case, to which reference is hereby made. This case was agreed upon to obtain the decision of the courts, pursuant to the provisions of the New York Code of Procedure.

The judgment of the supreme court was in favor of the plaintiffs, and a perpetual injunction was granted, restraining the defendants from assessing the plaintiff and his associate shareholders in the First National Bank of Albany.

This judgment was reversed in the court of appeals, and judgment ordered in favor of the defendants, and the plaintiffs sue out this writ of error to this court. The opinion of that court, delivered by Judge DENIO, is herewith submitted to the court.

POINTS.

I. Independent of the provision relating to taxation of the shares of stockholders, contained in section 41 of the act of congress, passed June 3d 1864, the states would have no power to tax the shares of stockholders in national banks.

1. National banks, organized under the banking acts of 1863 and '64, are instrumentalities provided by the federal government, necessary and proper to carry into effect the powers conferred upon congress. This proposition is fully conceeded in the opinion of Judge DENIO, and will be entirely apparent when the functions of these banks are considered and examined. They are made depositories of the public funds of the United States, and authorized to issue a paper currency, under the control of the government, and are, in all respects, as useful and necessary to aid the fiscal operations of the government as was the late Bank of the United States. Every reason and argument assigned by the supreme court in favor of exempting the operations of that institution from the taxing power of the states, will apply to these banks.

McCullough *v.* State of Maryland, 4 Wheaton, 316.
Osborn *v.* The Bank of the United States, 9 Wheaton, 738.

2. Nor does the fact that these corporations are clothed with the power of carrying on banking operations, for the individual benefit and profit of their stockholders, change their character as public instruments, and agents of the government, for such was also the late Bank of

the United States, which, notwithstanding these attributes of a private corporation, was declared exempt from the taxing power of the states, in the cases above cited.

3. It being clear that the states cannot tax the banks directly, the same process of reasoning by which their exemption is established, leads to the conclusion that shareholders cannot be taxed on account of their ownership of this species of property. In the case of Dobbins *v.* Commissioners of Erie Co. (16 Peters, 435), it was adjudged that a captain in the United States revenue cutter service could not be taxed by a state for his office, or its emoluments. This conclusion of the court was declared to be the result of the decisions above cited, holding that instrumentalities of the federal government could not be taxed by state authority; that the federal government was supreme in its sphere of action; that it must employ officers and agents, and its power and ability to employ them might be impaired by the existence of a power in the states to tax such officers for the compensation which they were to receive. Apply these principles to shareholders in banks. Banks, as we have seen, are the fiscal agents of the government. Banks would be mere inanimate creations, without shareholders to subscribe for and take the stock. In the language of MARSHALL, in 4 Wheaton, 487, "the power to tax involves the right to destroy."

The right to tax by a state, wherever it exists, is necessarily supreme, and, as an attribute of sovereignty, is not subject to control. It may be carried to any extent. The whole taxes of a state may be imposed upon shareholders in these banks. Acknowledge the existence of the power, and discriminating or

hostile legislation may result in the destruction of that species of property, and compel the winding up of these banks.

It is respectfully submitted that the analogies suggested by Judge DENIO, arising from taxation of partnerships, or from the general practice of the states, throw no light whatever upon the qustion of power by an inferior sovereignty to tax the agencies of the federal government. (See his opinion, pp. 6 and 7.)

4. It is respectfully submitted, that the remark by Chief Justice MARSHALL, in the case of McCullough *v.* The State of Maryland, relied upon by Judge DENIO, and quoted at page 7 of his opinion, was purely a *dictum*, and is not warranted by the principles laid down by this court. On the contrary, it is insisted that the qualification is in conflict with the doctrines and principles affirmed by this court in the following cases:

Dobbins *v.* Comrs. of Erie Co., 16 Peters, 435.
Brown *v.* Maryland, 12 Wheaton, 419.
Weston *v.* City Council of Charleston, 2 Peters, 449.
Sturges *v.* Crowninshield, 4 Wheaton, 122.
Houston *v.* Moore, 5 Wheaton, 1.
Osborn *v.* Bank of U. S., 9 Wheaton, 738.

5. The two cases of Bigelow *v.* The City of Charleston, 1 Nott & McCord, 527, and State *v.* Collector, 2 Bailey, 654, cited, with approval, by Judge DENIO (p. 9), holding that stock in the Bank of the United States was taxable by state authority, will attract attention, by reason of the grounds on which they were decided. They were decided by the same court which held that federal securities were taxable by state authority, but their decision on that point was reversed by this court, in Weston *v.* City Council of Charleston, 2 Peters, 449.

In one of these cases, the court admits that the effect of their decision may be to drive the bank to seek for stockholders beyond the jurisdiction of the state which exercises the power, while in the other, it is boldly declared that the decisions of this court are vicious and unsound, and for that reason the supreme court of South Carolina declined to be governed by them.

Thus, in the first case, Judge JOHNSON, in delivering the opinion of the court, says:

"But it is said that the right of taxation might have the effect of driving the stock without the city, if exercised to an extent beyond the profits arising therefrom, and, upon the same principle, without the state, and even without the United States.

"*Be it so.* If policy or necessity require that it should be driven out of the city, it may find market beyond Boundary street, and if without the state, it may find a market in the neighboring states; and if without the United states, it may find it abroad.

"The answer to it is, that if congress thinks proper to establish a bank on other funds than its own, it does not possess the power of compelling any individual to purchase the stock, but must send it into the market and where individuals find it to their interest to participate."

In the second case, Judge HARPER cites the cases of Sturges *v.* Crowninishield, 4 Wheaton, 122, and Houston *v.* Moore, 5 Wheaton, 1, which he admits hold that, "where a power has been granted, and although not prohibited to the state, yet having been exercised by congress, the exercise of the power of the state is incompatible with the act of the federal government,"

and after referring to this doctrine, the learned judge proceeds thus:

"The argument is, that if the state may tax the dividends one per cent, it may tax to any amount, and thus banish the stock from the state. Perhaps it might be said, that although the state should tax the dividends so highly as to banish the stock from the state, the bank might still exist and answer all the fiscal purposes of the government; nay, that considered merely as a banking institution, it might perhaps do as profitable a business as it does at present. The state would only deprive its citizens of a convenient method of investing their funds; and this might be, although the stock should be banished from many states or the stock owned exclusively by foreigners.

"But notwithstanding the high authority by which it is supported, and the modesty with which it becomes me to speak of the decisions of such a tribunal as the supreme court of the United States, I think the reasoning itself utterly *vicious, unsound and dangerous.*"

What consideration these decisions are entitled to receive, will now be determined by this high tribunal, whose adjudications are thus assailed, "as vicious, unsound, and dangerous."

It seems that the ownership of the stock by foreigners affords no protection against the taxing power of the state; for the law of New York, under which the tax assessed on the plaintiff and his associate stockholders was imposed, makes it the duty of the national banks to retain the dividends to pay the taxes. Sec. 11 of the act of March 9th, 1865.

6. The importance of a correct determination of this proposition will be apparent, when it is

considered that the converse doctrine constitutes the pervading idea of the opinion by the court of appeals, and that the consequence of declaring that these shares are liable to state and municipal taxation, without permission by congress, may be to render any attempt by congress to impose limitations upon this power, nugatory.

Indeed, the position taken by the plaintiff in the court below, and which will be hereafter discussed, that the assertion of the power to tax, made in this case, by the State of New York, was a direct invasion of the limitation imposed by the national banking act, receives but a superficial and cursory examination in the opinion of Judge DENIO. (See page 17, of his opinion.)

II. The shares owned by the plaintiff in error and his associates, in the First National Bank of Albany, were exempt wholly from taxation by state authority, because the whole capital stock of the said bank was invested in the securities of the United States, which were exempt from such taxation.

1. By express provisions contained in acts of congress, these bonds and securities were declared exempt from taxation, by state or municipal authority, in the hands of corporations or individuals.

   (*a.*) $125,000 were in 7-30 treasury notes, issued under an act approved March 3, 1865, which declared that "all bonds or other obligations issued under this act shall be exempt from taxation by or under state or municipal authority." (§ 2.)

(*b.*) $149,000 were in 5 per cent bonds, issued under an act approved March 3, 1864, which contained a similar provision. (§ 1.)

(*c.*) $151,000 were in 6 per cent bonds, issued under an act approved February 25, 1862, which contained the following declaration:

"And all stocks, bonds and other securities of the United States held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under state authority. (§ 2.)

These sums make $425,000, or $25,000 more than the capital of $300,000, and the surplus of $100,000. (*Fols.* 5 and 13.)

(*d.*) In addition to these acts, another was passed after the banking act of 1864, and was approved June 30, 1864, which contains the following provision:

"And all bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal authority." (§ 1.)

These provisions are declared by the constitution of the United States to be the supreme law of the land, anything in the constitution or laws of a state to the contrary notwithstanding.

Article 6, Constitution of the U. S., § 2.

2. Independent of any express declaration by congress, all such bonds and securities are exempt

absolutely from state taxation, by virtue of the constitution of the United States, and such has been the law long settled by the supreme court of the United States.

Weston *v.* City of Charleston, 2 Peters' R., p. 449.
Bank of Commerce *v.* City of New York, 2 Black's R., p. 620.
Bank Tax Case, 2 Wallace R., p. 200.

For a full vindication of this rule, and to show that it is the result of the power conferred on congress to borrow money, see remarks of MARSHALL, Ch. J., in 2 Peters' R., p. 465. He says:

. "But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands, of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can anything be more dangerous or more injurious than the admission of a principle which authorizes every state and every corporation in the Union, which possesses the

right of taxation, to burden the exercise of this power at their discretion?

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits.

"It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods, for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend, may be burdened, impeded if not arrested, by any of the organized parts of the confederacy."

3. The exemption from taxation, which belongs to these securities from their own nature, attaches to and follows them, when they become the property of a banking corporation in the State of New York.

> See the cases in Black and Wallace, above cited, and especially the remarks of Judge NELSON in the last case, on page 208. The Banking Act of Congress is substantially framed on the same principles with the New York general banking law of 1838, which was discussed by Judge NELSON in the case in 2 Wallace.

4. The act of congress authorizing the creation of national banking associations, or corporations, does not subject these securities to taxation by state authority, in the hands of the stockholders.

That provision, after declaring that a certain tax on their circulation should be paid to the federal government "in lieu of all other taxes," contains the following language:

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states; *Provided, further*, That the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located." "Provided, also, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value as other real estate is taxed." (§ 41.)

(*a.*) Its language does not subject the shares to taxation, but saves such shares from being declared exempt by virtue of the banking act of congress.

(*b.*) It cannot be construed as repealing the provisions cited under Point 1st, declaring these bonds exempt from taxation, on the familiar principle that repeals by implication are not favored, and that if it is possible for both laws to stand, they must be so construed.

(*c.*) Assuming for argument (which is denied), that congress might subject

bonds issued on the credit and faith of the people that they should be exempt from taxation, to such taxation, after the holders had loaned their money to the government, nothing but the clearest language could show that congress intended to do an act so plainly in conflict with the terms on which the loans were made.

(*d.*) The history of the course of adjudication on the question of the power to tax by the state, any instrumentality of the federal government like a national bank, shows the purpose of the provision in question.

Such a bank being, as its public purposes show, in part a fiscal agent of the government, it was itself exempt from taxation, as was held, substantially, in the following cases:

Dobbins *v.* Com'rs Erie Co., 16 Peters, 435.
McCullough *v.* State of Maryland, 4 Wheat., 316.
Weston *v.* City Council of Charleston, 2 Peters, 449.
Osborn *v.* Pres., &c., Bank of U. S., 9 Wheat, 738.
Brown *v.* Maryland, 12 Wheat., 419.
Stinger *v.* Crowninshield, 4 Wheat.
Houston *v.* Moore, 5 Wheat., 1.

In McCullough *v.* The State of Maryland (4 Wheaton, p. 316), Judge MARSHALL had recognized the right of the state to tax stock in a national bank in the following language: "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common

with the other real property within the state, nor to a tax imposed upon the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

This language, erroneously cited sometimes as warranting the doctrine that government securities owned by a bank are taxable, was never intended to subject property exempt in its own nature, to taxation.

Judge MARSHALL, himself, explains that language and repudiates such a construction, in the case in 2 Peters, on page 467. He says:

"It has been supposed that a tax on stock comes within the exception stated in the case of McCullough *v.* The State of Maryland. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state, was supposed to be placed in the same condition with property acquired by an individual.

"The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the U. S., and consequently to be repugnant to the constitution."

Again at page 467, he there shows

that states have no jurisdiction over this subject.

"All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

THOMPSON, J., in dissenting from the opinion of the court, in Weston *v.* City of Charleston (2 Peters, *supra*), recognizes the sweeping effect and force of the decision made by the court, Thus, at page 476, he says: "If the objection to this tax is to be sustained, it must be on the broad ground that stock of the United States is not taxable in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation, and that I understand is the extent to which a majority of this court mean to carry the exception."

The object of this proviso, therefore, was to leave the property of shareholders liable to be taxed in common with other property of a like description throughout the state. As these national banks were only required to invest *one-third* of their capital stock in federal securities (see sec. 16 of the national banking act), the remaining two-thirds would, in most cases, remain liable to taxation by state authority.

A further object was to leave these shares exposed to taxation, although they might be invested in national banks, provided they would be liable, if owned by individuals. A still further object was to prevent the expression "in lieu of all other taxes," from being construed to relieve the shares from taxation by state authority.

5. Shares in national banks, within the meaning of the banking act, are only fractional parts of the capital stock, and if the stock itself is exempt from state taxation, such parts are also exempt.

Sec. 6 of the banking act requires that the organization certificate shall specify "the amount of capital stock and the number of *shares* into which *the same* shall be divided, the names of the *shareholders* and the number of *shares* held by each of them."

Sec. 12 provides, "That *the capital stock* shall be divided into *shares* of one hundred dollars each, and be deemed personal property, transferable," &c.

Against the refinement that these shares represent some indefinable interest, or property,

other than the capital stock, we oppose the remarks of this court, in the opinion delivered by Mr. Justice NELSON:

"Now, when capital of the banks is required or authorized by the law to be invested in stocks, and among others in United States stocks, under their charter or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money, set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credits in the business community."

6. To the argument that a tax upon these shares, although parts of a capital invested in government securities, is a tax upon the banking use, to which they are applied, it is answered, that the use of the bond is only an incident or privilege which attaches to the bond, and a tax upon such use is therefore a tax upon the bond itself.

7. To the citation of the opinions by Senator Collamer and others, given in debate, it is answered, that such sources are never safe guides of construction upon a question of constitutional law, and are entitled to but little weight before a judicial tribunal.

8. To Judge DENIO's remark, on page 8, that it is "frightful to contemplate" the idea of withdrawing these means from state taxation, we answer, that they were already withdrawn by the operation of the constitution of the United States, and that it is quite as alarming to find that they are to be drawn into the vortex of such taxation, by a process of artificial reasoning, in opposition to the faith of the government as pledged in the acts authorizing the loans. The immunity flows from the supremacy of the federal government, and is a result of the power conferred upon congress "to borrow money;" a power which in the late great struggle preserved the government and Union from destruction. If war must be declared against this privilege, let it be aimed at the constitution itself, which is the fountain head of the difficulty.

III. The statute of New York under which the tax in question is imposed is unconstitutional and void, on the ground that it conflicts with the limitation contained in section 41 of the banking act of congress of 1864, inasmuch as shares in banks organized under the authority of the State of New York are not taxed at all by the laws of that state, and hence the tax on these shares exceeds the rate upon the shares in domestic or state banks.

(a.) By the laws of New York, no share in a bank of the state is liable to taxation.

Section 14 of its tax laws (1 R. S., 5th ed., 907, sec. 14) exempts the owner or holder of stock in an incorporated company from taxation, as an individual, for such stock.

Title 4 of said laws declares all

moneyed corporations liable to taxation on their capital and surplus. (*Sec.* 1, *page* 944, *secs.* 3, 7 *and* 10.)

This was modified by chapter 240 of the Laws of 1863, but this modification only changed the mode of ascertaining the amount of such capital and surplus.

In 2 Wallace, p. 206, Judge NELSON thus characterizes the change:

"Looking at the two acts, and endeavoring to ascertain the alteration or change in the law, from the language used, the intent of the law makers would seem to be quite plain, namely, a change simply in the mode of ascertaining or taxing the amount of capital of the banks which is made the basis of taxation."

(*b.*) Not only are the shares not taxed in the state banks; but in cases like the present, where the capital is invested in government securities the capital is not taxed, thus relieving the shares from indirect taxation.

(*c.*) The court of appeals say, in this very case, that the shares in state banks are not taxable. At page 17, Judge DENIO says:

"Our laws do not authorize the taxation of shares in the banks organized under the authority of the state. We tax our domestic banks on their capital, pursuant to the act of 1863; and it is presumed that the taxing officers conform to the judgment in the bank tax case reported

in 2 Wallace, by deducting the part invested in United States bonds."

(*d.*) According to the decision of the court of appeals, in this case, that shareholders do not own the bonds in which the capital stock may be invested, and that the shares may be taxed, although such capital stock is all invested in government securities, it would be entirely competent for the legislature of New York to tax shareholders in state banks, although the capital of such banks may be thus invested. As to shares in state banks, whose capital is not so invested, it is apparent that there is no impediment in the way of a state law taxing such shares.

(*e.*) While, therefore, shares in New York state banks are not taxed at all, and while the limitation imposed by the banking act upon the right to tax shares in national banks declares that the tax shall not exceed the rate imposed upon the shares in the state banks, yet the court of appeals decides that the New York statute which declares that shares in national banks may be taxed up to their par value "does not impose a tax beyond the limits prescribed in the proviso in the act of congress" (p. 17).

In another part of the opinion, the learned judge concedes that the proviso has the force of an enactment (p. 11).

In other words, then, this decision holds that shares taxed at their par

value are not taxed at a greater rate than other shares not taxed at all, or for any amount.

The learned judge may be quite right in holding that these shares are not taxed at a greater rate than other moneyed capital in the hands of individuals, but he seems wholly to have overlooked the other proviso relating to shares in State banks.

It would seem too plain for argument that a law of New York taxing national bank shares and exempting state bank shares would exceed this limitation. And yet such is this case, except that there are two laws instead of one, the first exempting shares in state banks, and the second declaring national shares liable to taxation. Suppose the law should tax national shares at their par value and state shares at one-fourth of their par value, would it not be the merest quibble to say that the rate of taxation was the same in the two cases? The equality in the rate of taxation aimed at in this proviso means that both shall be put on the same footing and enjoy an equality in sharing the burdens of taxation.

(*f.*) The purpose of the proviso was to prevent the states from taxing national bank shares more than they taxed their own bank shares, and this purpose is plainly thwarted by the New York statute.

If such a palpable discrimination against national banks can be toler-

ated, it being manifest that except this proviso there is no limitation whatever on the power to tax shares in national banks, provided the objections presented in Points 1 and 2 are overruled, it follows that the states may tax all the national banks out of existence, for "the power to tax involves the right to destroy."

4 Wheat., 487.

(*g.*) We insist, that before any law passed by a state imposing a tax upon shares in national banks can become valid or operative, there must be a like law taxing shares in state banks, for without such law any tax whatever on national bank shares exceeds the rate imposed upon the state banks, and that a contrary construction ignores the plain language and spirit of the limitation.

(*h.*) As to the constitutionality of this limitation, it is supposed there can be no doubt. Judge DENIO bases an argument upon the point that congress may waive in favor of the states the right to tax these shares, and we do not controvert this proposition. (See pp. 16 and 17.) If, then, congress may waive the privilege of exemption from state taxation in favor of these shareholders, surely it may prescribe the conditions and extent of the waiver.

Congress having undoubted power to create these banking corporations, may constitutionally preserve them from destruction by state taxation.

In the language of the Chief Justice, in 4 Wheaton, 485, "the power to create implies the power to preserve."

IV. Shares of stock in the First National Bank of Albany were not liable to be taxed under the New York statute of March, 1865, because that bank was organized under the act of congress of 1863, while that statute only applies to banks organized under the act of congress of 1864. (See case.)

N. Y. Statute, §§ 1 and 10.

1. Assuming what is said by Judge DENIO on this point, at pages 18 and 19, to be true, that, by the act of congress, banks organized under the act of 1863 were subject to all the duties and liabilities imposed by the act of 1864, taxation under the authority of a state is not imposed by any act of congress.

   As to this bank, then, the case stands as if the New York statute were not in existence. The court of appeals decided, in the case of Churchhill *v.* The City of Utica, that prior to that statute no shareholder residing out of the ward where the bank was located, could be taxed in such ward. (See DENIO'S opinion on these cases, p. 18.)

2. The N. Y. statutes and the decisions of her highest courts have declared that, prior to the act of March, 1865, the owner of personal property can only be assessed therefor in the town or ward where he resides, and that any assessment elsewhere is illegal and void.

   See Mygatt *v.* Washburn, 15 N. Y. R., 316.
   1 R S., 389, § 5.

3. As all the shareholders in this bank resided out of the ward where it was located, except one,

Mr. Delevan Peck, the judgment, in any event. should be reversed, as to all the parties, except Peck, and also as to him, unless this court shall hold, that in the absence of any statute of the state, expressly authorizing shares in national banks to be assessed, they may be thus assessed. Under Point 3d we have endeavored to establish the contrary proposition.

V. The judgment or decree of the court of appeals should be reversed and that of the supreme court affirmed, with costs.

LYMAN TREMAIN,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

MICHAEL A. NOLAN and others, as the Board of Assessors of the City of Albany, *Defendants in Error*,

adsm.

ADAM VAN ALLEN, *Plaintiff in Error.*

Abstract and Points of Defendants in Error.

The First National Bank of Albany, in which the plaintiff in error is a shareholder, is a corporation organized on the 19th February, 1864, under the act of Congress passed February 25, 1863, entitled "An Act to provide a National Currency, &c.," and is located and doing business in the Fifth Ward in the City of Albany, and was so located for more than a year before suit brought. The plaintiff has been a shareholder in said bank for more than a year. The capital of the bank is three hundred thousand dollars.

At the time of making the assessment hereinafter mentioned, the last mentioned bank owned, and now owns, stocks and bonds of the United States to the amount of four hundred and twenty-five thousand dollars, including one hun-

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At the time of making the assessment hereinafter mentioned, the last mentioned bank owned, and now owns, stocks and bonds of the United States to the amount of four hundred and twenty-five thousand dollars, including one hun-

dred and twenty-five thousand dollars of Treasury notes. The whole of the capital stock of said bank being invested in said bonds and Treasury notes. The surplus of said bank is about $100,400.

The defendants, as the Board of Assessors of the City of Albany, between the third Monday of April and the first of September, 1865, assessed the plaintiff in said Fifth Ward, for fifty shares of the capital stock of said bank, which he then held and owned, and they also assessed each of the stockholders in said bank in said Fifth Ward for the amount of capital stock owned by each, at the par value of the stock, viz.: one hundred dollars per share.

With the exception of Delavan Peck's thirty shares, all of the stockholders of said bank reside out of the Fifth Ward of the City of Albany.

A case was agreed upon between the parties for the purpose of testing the liability of the plaintiff in error to pay said tax, under section 372 of the Code of Procedure of the State of New York, on which judgment was rendered in favor of said plaintiff in error by the Supreme Court of said State, at September Term, 1865. By such judgment the defendants in error were restrained from collecting the taxes imposed. From that judgment the defendants appealed to the Court of Appeals of said State, where judgment was reversed, and judgment rendered in favor of the defendants in error. The plaintiff in error thereupon brought a suit of error to this Court.

The question presented is whether the shares of the stockholders in the banking associations created under the acts of Congress which provide for the creation of national banks, can be subjected to taxation by State authorities.

This case differs from that of Williams against the same defendants, in the additional feature as to the time of organization, presented under Point VIII.

POINTS.

I. The shares of stock in the national banks are declared to be personal property.

Ch. 106 Sec. 12, Sess. 1 of 38 Congress, page 101.
Ang. & Ames on Corp., §§ 557, 558.

All lands and personal estate within the State of New York, whether owned by individuals or corporations, are declared by the Statute of that State to be liable to taxation, subject to the exemptions therein declared.

1 R. S. of N. Y., 5th ed., 904, § 1.

And one of the exemptions is declared by the Statute of New York to be "all property real and personal, exempted from taxation under the Constitution of this State or under the Constitution of the United States."

1 R. S. of N. Y., 5th ed., 906, § 5.

Congress has no power to declare any species of property exempt from State taxation, except it be property exempted by the Constitution of the United States.

The sole ground upon which the courts have pronounced the taxation of U. S. bonds void, was that it was a violation of the Constitution of the United States.

II. The Constitution of the United States has not, in express terms, exempted either national banks or U. S. bonds from State taxation. But it has been decided by the U. S. Supreme Court that they are exempt by implication, for the several reasons hereinafter mentioned.

In regard to the power of a State to tax the late United States Bank or its branches, it was held that "The State Governments have no right to tax any of the constitu

tional means employed by the Government of the Union to execute its constitutional powers," and "no power by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the power vested in the National Government."

McCulloch v. The State of Maryland, 4 Wheaton, 466.

In regard to the power of a State to tax U. S. bonds, the reason given against its exercise was, that it is a tax on the contract between the Government and the individual," a tax on the power to borrow money on the credit of the United States, and consequently repugnant to the Constitution."

Weston vs. The City of Charleston, 2 Peters, 465, 469.

Bank of Commerce vs. The City of New York, 2 Black, 620.

Bank Tax Case, 2 Wallace, 200.

III. If it is claimed that this tax is not maintainable because the bank in which the shares are owned is a national institution, and one of the constitutional means employed by the Government, the position is untenable.

1. Because the banks in question are not such instruments of the Government as to exempt them from taxation.

There was much more reason for holding that the late Bank of the United States was an instrument of the Government created for the purpose of carrying on its constitutional operations, than there is for saying that the national banks of the present day are such instruments.

The Government owned seven millions of the thirty-five millions of capital of the former Bank

of the United States, and appointed five of its twenty-five directors, and it contributed one million and a half of its funds to the public resources. It was made subject to the visitation of the Secretary of the Treasury, and was bound to obey his orders, for transferring the public funds, without charge for exchange, to all parts of the United States and the Federal Territories.

None of these features belong to the banks now called national banks. It is true they are used as depositories of the public funds, and so were the state banks for many years; but it was never claimed that, for that reason, they were such instruments of the Government as to be exempted from taxation.

It was said of the late Bank of the U. S., by Ch. J. MARSHALL, in Osborn v. The Bank of the U. S., 9 Wheat., 769: "The casual circumstance of its being employed by the Government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power (the taxing power of the state), than it would exempt the private business of any individual."

The decisions in 4 Wheat. and 9 Wheat. were put on the express ground (9 Wheat., 770,) that the bank was not "a private corporation, whose principal object was individual trade and individual profit, but a public corporation, created for public and national purposes," and was "necessary and proper for carrying into effect the powers vested in the Government," and it cannot be justly claimed that that decision is applicable to the present national banks.

As well might it be claimed that personal property, invested in a line of stages, or in the

stock of railroads, employed in carrying the U. S. mails, or in an express company, engaged in carrying parcels for the Government, or in a telegraph company, employed in transmitting messages for the Government is exempt from taxation.

2. But conceding, even, that the banks called National Banks, are to be governed by the same rule as that applied to the late Bank of the United States, the conclusive answer to the exemption claimed is, that the banks themselves are not taxed, nor is any question of right to tax such banks involved in this case.

It was decided in McCulloch vs. the State of Maryland, that the late Bank of the United States was not liable to state taxation—but it was also decided in that case, that the shareholders were liable to such taxation.

Though taxing the bank itself, which was the active, living instrument of the Government, was, for that reason, held to be unconstitutional, it was held that the interests of the *shareholders* were not within either the prohibition or the reason for it, for it was held in that case, that though the Legislature of Maryland had no power to impose a tax on the Bank of the United States, and that such tax was unconstitutional and void, yet that the State might tax the real estate owned by the bank, *and the shares of stock which the citizens of Maryland held in the institution.*

4 Wheaton, 491.

In that case, it became necessary to define and declare the precise limit of the taxing power, and

the Chief Justice concluded a full examination of the question, as follows:

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax, paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed upon the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank; a tax on the operations of an investment employed by the Government of the Union, to carry its powers into execution. Such a tax must be unconstitutional."

The reasoning of this case is repeated and the decision reaffirmed in Osborn vs. The Bank of the U. S., 9 Wheat., 738, 769, and in the License cases, 5 Howard, 576.

The enforcement of a tax on the bank itself, being upon the operations of the bank, might be the means of suspending its operations and depriving the Government of the use of its instrument. But a tax on the shareholder could only be enforced against him personally, and could to no degree, interfere with the operations of the bank. A sale under the tax of his shares of stock, would only substitute a new stockholder in his place, and in no respect delay the business operations of the bank.

Of the distinction thus taken, it is well said by DENIO, Ch. Judge, in pronouncing the judgment now under review:

"It was the consideration of the mixed character of the purposes for which the Bank of the United States was incorporated, and the two-fold character of its operations, and of the interests it

was intended to promote, which led the Supreme Court of the United States, in determining the question of the liability of that institution to taxation, carefully to discriminate between the interests of the individual shareholders, which represented their private investments in the stock, and the corporate body itself."

(For a more full discussion of the reasons for this discrimination between taxing the bank and taxing the shareholders, see the next Point.)

3. It has been expressly decided that stock in the Bank of the U. S. held by individuals may constitutionally be taxed by a State.

Bulow v. The City of Charleston, 1 Nott & McCord, 527.
State v. Collector, 2 Bailey, 654.

And it is believed that no different rule of law on this point has been claimed, either in the State or U. S. Courts.

IV. If it is claimed that this tax is not maintainable under the decisions in 2 Peters, 2 Black and 2 Wallace, above cited, on the ground that this is a tax on the bonds, or rather on the owner of the bonds of the United States, we answer, the tax is not on the bonds nor on the bank owning such bonds, as it was in the cases cited.

1. The bank is a corporation—an artificial person, and has an independent legal existence, and is the legal owner of the bonds. The bank alone can buy and sell and control the corporate property, and the bank alone can be taxed for any taxable property it may own.

The stockholder is, in no sense, the legal owner of the bonds. He did not buy them and cannot sell them. He can exercise no control whatever over them. He has no right to their custody, or even to see them. They cannot be sold at law, or reached by proceeding in equity to satisfy a debt of the stockholder. They are only liable for a debt of the corporation. The holder of the bills and not the shareholder, has the first claim on the assets of the bank, and is the better entitled to be called the owner.

2. The shares of stock belonging to the shareholder are only *choses in action*, in regard to which his only claim is on the corporation, and not on the United States. Those shares represent a business enterprise—profit or loss by banking, surplus profits—an interest to, perhaps, three times the amount of the capital in discounted paper, or credits at other banks, and an interest in or liability for a circulation of bank notes. The shares of stock represent the investment—the *speculation*, whether it be a good one or a bad one; and it is almost invariably the former, the profits being very large—generally from 15 to 40 per cent. The case shows that the bank represented in this case has acquired a surplus of $100,400, on a capital of $300,000, in doing business a little over a year—thus showing a profit of about 33 per cent in addition to the dividends already made.

3. The *bank* owns the U. S. bonds. The shareholder in the bank owns merely the right to a share of the profits made in *banking* on such bonds.

A bank share, costing originally but $100, may have a market value of three times that sum, not because the capital of the bank has been increased, but because, by reason of the skillful management of the bank and the great privileges conferred with its franchise, large dividends are made.

The shareholder paid his money to the bank, not for U. S. bonds, but for a chance in the speculation, and he took a certificate accordingly. The bank may own the U. S. bonds one day and sell them the next, but the stockholder's rights and interests remain the same. They are in no way affected by the question whether the bank does or does not own any U. S. bonds.

A share of corporate stock is defined to be "a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted."

Ang. & Ames on Corp., § 557.
Wildman v. Wildman, 9 Vesey, 177.
Kirby v. Potter, 4 Vesey, 751.
Bank of Waltham v. Waltham, 10 Metc., 339.

That the shareholder is not, in a legal sense, the owner of the corporate property, is apparent from the consideration that though the corporate property consist of real estate, the shares are still personal property.

2 Kent's Com., 341, note.

It is said "the land, buildings, &c., of companies are the mere instruments whereby the company is made to produce a profit, *and moreover, belong exclusively to the corporate body, which*

is altogether a separate person from the individual members."

Ang. & Ames on Corp., § 557.
Bradley v. Holdsworth, 3 Meesb & Welsb., 334.

The same view as to the ownership of shareholders in the property of a corporation has been recently taken by the Queen's Bench in England, in The Queen v. Arnoud, 9 Adolphus & Ellis, N. S., 806.

The British acts of Parliament forbid the registry of a ship as a British vessel, unless it is wholly owned by British subjects. If a part owner is not a subject, it cannot be registered.

A mandamus was sued out to compel the registry of a vessel owned by a British corporation, some of the shares of which were owned by foreigners. Judgment was given for the plaintiff, sustaining the right of registry. Lord DENMAN said:

"It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

There may be a large surplus of profits belonging to the bank, exceeding the value of the U. S. bonds that the bank may own; but neither the bank nor the shareholder can be taxed for such surplus—the bank not being taxable at all, and the limit of taxation on the shareholder being the par value of his stock.

Chap. 97, Sess. Laws of N. Y. for 1865, § 10, page 173.

4. The contract to be protected by the Constitution is between the Government and the corporation, not between the Government and the shareholder.

5. There is a reason for not taxing a bond held as an investment. There the holder is restricted in his profit to the interest agreed to be paid. To tax the holder would lessen a fixed compensation. But when the privilege and profit of banking on the bond are given, the reason for exemption no longer exists. The tax is on the franchise and not on the bond, and such was the view taken on this subject in Congress when the act under which these banks were authorized was passed, containing the express authority to tax the shareholders.

6. In the case in 2 Black., it seems to be conceded that the State may tax the nominal capital of a bank without regard to value or valuation, whether it held U. S. stocks or not—for, in that case, it would tax the franchise and not stock; and the distinction here is still wider between the shares of the stock and the bonds held by the corporation, than it would be between the nominal capital of a state bank and the U. S. bonds in which it was invested.

V. Thus far we have examined the right to tax these banks, as it exists, independent of any action of Congress. But the act of Congress, chap. 106, first Session of the 38th Congress, sec. 41, passed June 3d, 1864, under which National Banks are organized, expressly permits the stockholders of such banks to be taxed on *all* their shares, and it gives this permission in the same act by which it provides for investing the capital, or a portion of it, in U. S. bonds.

And that it was not deemed to be a taxing of the bonds, is evident from the fact that no deduction is provided for, or required to be made for the capital so invested.

The only proviso is, that the *rate* shall not be greater than is assessed upon other monied capital, or on banks organized under state authority.

Stockholders in National Banks cannot be assessed at the *rate* of *two* per cent, when state banks are assessed at the *rate* of *one* per cent. There is no ambiguity in the language employed, nor any doubt as to the meaning of the word *rate*.

It is conceded that Congress has no power to regulate the machinery of state taxation—and, perhaps, none to say *where* the tax shall be assessed. And it is conceded that Congrese can confer no additional powers on state governments.

But has not Congress the power to surrender a claim as regards property belonging to the United States? May it not waive a right?

We do not think Congress has done so in this case, for we have already shown that the right to tax bank shares exists independent of any action of Congress. But would not Congress have the right to say the state might tax certain bonds which it then proposed to issue?

The immunity from taxation is adjudged on the sole ground, and only so far as such exemption is necessary for the National credit or for the public interest. Congress is the sole guardian of that credit and of such interests; and if Congress, in its discretion, decides that the public interests require that such exemption should be waived, surely the waiver would be valid and effectual.

Although, therefore, Congress, by its enactment, can add nothing to the force of the constitutional prohibition, yet, inasmuch as that constitutional prohibition, resting only on implication, extends no further than the protection of the public interests may require, and as Congress

is the sole judge of the extent to which such protection is necessary, Congress may, in its discretion, waive the exemption.

The holder of a U. S. bond cannot complain of such an exemption when the same act of Congress conferred on him a franchise, and the means of adding largely to his profits by using the bonds for banking, and when the exemption from taxation was only to be waived in case the holder should elect to avail himself of the additional profits afforded him by such use of the bonds. In permitting the States to tax the shareholders, Congress recognizes the right of the State in which the bank is located, and whose laws and officers protect the persons and property of the stockholders, to call for a contribution of a joint portion of the expense; and Congress also, by the act in question, initiates a policy which, by equalizing the burthens of taxation, satisfies the public sense of justice, and thus strengthens the public credit.

VI. There is no breach of faith by Congress in subjecting the shares of stock to taxation, although the whole amount of the capital of the bank was required to be, and in fact was, invested in United States securities, which when purchased by the bank, were exempt from State taxation.

1. The bonds were not, before they were authorized to be made the basis of banking, exempt from such burdens as Congress might see fit to impose upon their owners. They were merely exempt from State taxation for the benefit of the Federal Government.

2. When Congress authorized these bonds to be made the basis of banking, authorized the owners to

issue notes to circulate as money upon a pledge of them, they granted to the owners a privilege at their option, and had a perfect right to subject them, when used for this purpose, to State taxation.

The present provision in § 41, was reported by the Senate Finance Committee in the place of a provision which contained this clause: "Provided, that no State tax shall be imposed on any part of the capital stock of such associations invested in the bonds of the United States, deposited as security for its circulation." On the amendment reported by the committee, there was a long dicussion on the point, whether any portion of the shares should be exempted from State taxation, by reason of any United States bonds the bank might hold, and on every vote the expression was very strong against the exemption.

Senator FESSENDEN and Judge COLLAMER, both forcibly argued that the shares should be made taxable, without reference to the amount of United States bonds the bank held, and more than two-thirds of the Senate agreed with them. FESSENDEN said, (*Cong. Globe, p.* 1872,) "We do not break faith at all; because when we proposed to exempt certain bonds, issued by the Government and purchased by individuals, from State taxation, it was simply as property so much invested, not as property used for the purpose of banking, giving to it another and distinctive character. We say simply in reference to this matter: 'If you choose, instead of specie or any other property that you have, which is to be deposited as security for your bills, you may deposit, and we will accept, bonds of the United States.' That is a privilege we give them. Then we say, when there is an organiza-

tion of a bank in this way, and the persons who put their capital into it take it out of their other business, or their other means, subject as that is to State taxation, and put it in this particular bank, that that capital shall remain subject to State taxation precisely in the same way that other property is, or that it was before they invested it in that particular mode. This is all we say with reference to it. The question as to taxing these banks out of existence which has been talked about, has not the slightest application in the world; because we limit the power of State taxation. They must tax this property thus invested precisely as they tax other personal property, and to no greater extent. The power of taxation is limited in the same way."

Judge COLLAMER said, (p. 1890.) "I insist that a tax upon the shareholders in a bank is no tax upon the stock of that bank." * * * "But to say that a tax upon the shares of a bank is a tax on the bonds that constitute the capital of that bank, is utterly fallacious." * * * "The truth is, that when we gave out these bonds to the people, all the assurance given to them was that they should not be taxed by the states. A man may have them and hold them, and I grant that they are property in one respect. For instance: they are the means of making a pledge; they can be used as collateral security for borrowing money. They are valuable in other ways, besides the interest received from the Government. But when you undertake to make a law by which you transfer them into banking capital, and enable the man who holds them, not to borrow money upon them, but to lend money upon them; that is entirely a different

affair; that is entirely a new privilege, and one to which, when granted, the Government may annex such conditions as it thinks proper."

At page 2,199, Judge COLLAMER further says: "But when we undertake to make them (United States bonds) into bank capital, and authorize the associations to issue currency upon the strength of them, and bank upon them, that is entirely a new privilege. That is the privilege of loaning money on them, not borrowing money on them; and for that new privilege of using these bonds as a banking capital, the Government has a right, of course, to annex to the grant of that new privilege such conditions as it may think proper, and it has annexed a great many conditions in this bill."

VII. The property being by law taxable, the Legislature has provided fully as to the mode and place of taxation, by passing an enabling act and re-enacting the provision made by Congress, by which shareholders were to be subjected to taxation.

Ch. 97, Sec. 10 of Laws of 1865, passed March 9, 1865.
Sess. Laws of 1865, page 172.

VIII. But it is said this enabling act of our State Legislature does not apply to "The First National Bank of Albany," represented in this action, because that bank was organized under the act of February 25, 1863, and not, as is alleged, under the act of June 3, 1864.

The enabling act is declared, in the 10th section, to apply to all banking associations organized under that act or under the act of Congress of 1864, mentioned in the first section.

The act of 1863 was, like the act of 1864, entitled "An Act to provide a National Currency, secured by a pledge of United States Stocks, and to provide for the circulation and redemption thereof."

Ch. 58 of 3d Sess. of 37th Congress, Laws of Congress, 665.

By the 62d section of the act of 1864, the act of 1863 was in express terms repealed, and all banks already established under the act of 1863 were declared entitled to all the rights and privileges granted, and subject to all the duties, liabilities and restrictions imposed by the act of 1864.

The act of 1864 thus superseded and took the place of the act of 1863, and the First National Bank of Albany, after the repeal of the act of 1863, depended for its existence and continuance entirely on the act of 1864; though first put in operation under the act of 1863, its organization was continued and kept up under the act of 1864.

The objection made is purely technical, and depends on giving a very narrow construction to the meaning of the word "organized." It is certain the Legislature intended no such construction, but, on the contrary, intended to subject the shareholders of all the National Banks to the same tax, and it is believed those which commenced business under the act of 1863, as well as those which commenced business under the act of 1864, are covered by the provisions of the enabling act. They are all organizations now existing and operating only by virtue of the act of 1864.

IX. The judgment of the Court of Appeals of the State of New York should be affirmed with costs.

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Attorney and of Counsel for the defendants in Error.